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No. 08-539

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ, *et al.*,

PETITIONERS,

v.

ROBERT SIMON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that Congress has not expressly or impliedly retroactively divested the courts of jurisdiction over existing cases against Iraq.

2. Whether Petitioners' implausible and unsubstantiated claims—that civil litigation against Iraq for torture and hostage-taking poses a marked threat to U.S.-Iraq relations—warrant Supreme Court intercession, and whether Petitioners' claims are, at least in part, mooted by the agreed-to Status of Forces Agreement.

3. Whether the President can constitutionally exercise both a "pocket veto" and a protective "return veto" (*i.e.*, a "hybrid veto").

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King v. St. Vincent's Hosp.,
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Landgraf v. USI Film Prods.,
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Miller v. FCC,
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Owens v. Republic of Sudan,
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QUALCOMM, Inc. v. FCC,
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Red Rock v. Henry,
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Republic of Iraq v. ABB AG, et al.,
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Cited Authorities

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Rubin v. Islamic Republic of Iran,
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Simon v. Republic of Iraq,
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Simon v. Republic of Iraq,
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United States v. Morrow,
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PRESIDENTIAL MATERIALS

Memorandum of Disapproval of President George W. Bush (Dec. 28, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/12/20071228-5.html). 5, 6

Memorandum of Justification for Waiver of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 with Respect to Iraq (Jan. 28, 2008) at http://www.whitehouse.gov/news/releases/2008/01/20080128-12.html. 25

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Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, 117 Stat. 559 (2003) ..... *passim*

Cited Authorities

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Iraq Sanctions Act of 1990, Pub. L. No. 101-513, 104 Stat 1979 (1990) 27

National Defense Authorization Act for Fiscal Year 2008 (Pub. L. No. 110-181, 122 Stat. 338 (2008)) 6

LEGISLATIVE MATERIALS

Martin A. Weiss, *Iraq's Debt Relief: Procedure and Potential Implications for International Debt Relief,* Congressional Research Service Report for Congress No. RL33378 (Mar. 31, 2008) 13

S. Con. Res. 61, 110th Cong. (Dec. 19, 2007) ... 32

Statement of Rep. Conyers, 154 Cong. Rec. E46, 47 (daily ed. Jan. 17, 2008) 18

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Determination Iraq, 55 Fed. Reg. 37,793 (Sept. 13, 1990). 10

Rescission of Determination Regarding Iraq, 69 Fed. Reg. 61,702 (Oct. 20, 2004). 10

Cited Authorities

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BOOKS AND ARTICLES

Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* (Amy Guttmann ed., 1997) 25

James Glanz & Campbell Robertson, *As Iraq Surplus Rises, Little Goes Into Rebuilding: Oil Windfall Unspent: Report Says Americans Bear Cost – Billions Sit in a U.S. Bank*, N.Y. Times, Aug. 6, 2008 12

Josh Rogin, *At Iraq's Urging, Bush Pocket-Vetoes Defense Authorization Bill*, CQ Today – Defense (Dec. 28, 2007) *at* http://public.cq.com/docs/cqt/news110-00000 2650500.html. 5

Louis Henkin, *Foreign Affairs and the U.S. Constitution* (2d ed. 1996) 8

Richard Cowan, *US senator wants Iraq oil funds used for rebuilding*, Reuters (Mar. 4, 2008 5:48pm EST), http://www.reuters.com/article/featuredCrisis/idUSN04467762 (last visited Oct. 7, 2008) 13

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Robert J. Spitzer, *The Law: The "Protective Return" Pocket Veto: Presidential Aggrandizement of Constitutional Power* Presidential Stud. Q. No. 4 (Dec. 2001) 34

Steven F. Huefner, *The Supreme Court's Avoidance Of the Nondelegation Doctrine In* Clinton v. City of New York*: More Than "A Dime's Worth of Difference,"* 49 Cath. U. L. Rev. 337, 398-99 (2000) 22

Walter Alarkon, *Democrats say Bush can't pocket veto defense bill*, The Hill.com (Jan. 2, 2008), http://thehill.com/leading-the-news/democrats-say-bush-cant-pocket-veto-defense-bill-2008-01-02.html 32

MISCELLANEOUS

Amb. Bremer Announces Former Regime Victims' Compensation Fund (26 May 2004), http://govinfo.library.unt.edu/cpa-iraq/transcripts/20040526_bremer_compensation.html 15

BBC News, *Iraqis reject US Ishaqi findings* (Jun 3, 2006), http://news.bbc.co.uk/1/hi/world/middle_east/5044244.stm 16

Cited Authorities

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CBS News, *Iraq Demands $136M Blackwater Payout* (Oct. 8, 2007)	16
Human Rights Watch, Iraq: US Data on Civilian Casualties Raises Serious Concerns (Apr. 11, 2007), http://www.hrw.org/	16
International Center for Transitional Justice, Middle East and North Africa: Iraq, http://www.ictj.org/en/where/region5/564.html (last visited Nov. 20, 2008)	15
Restatement (Third) of Foreign Relations Law of the United States § 208 (1987)	14
Rules of the House of Representatives, Rule (II)(2)(h) (Sept. 14, 2007)	33
United Nations Compensation Commission, Payment Procedure (last visited Nov. 20, 2008)	15
United Nations Compensation Commission, Status of Processing and Payment of Claims (as of 29 July 2008)	14
U.S. Department of State Fact Sheet (Sept. 2, 2008), http://www.state.gov/r/pa/prs/ps/2008/sept/109054.htm	11

INTRODUCTION

Granting this petition would be to indulge an absurdity: characterizing a handful of civil claims against Iraq as undermining negotiations for the withdrawal of U.S. troops, Petitioners cite no knowledgeable, contemporary authority and persist with this assertion despite the fact that the United States has just completed the Status of Forces Agreement ("SOFA")—the agreement Petitioners deemed impossible—with 27 of 28 Iraqi ministers approving it and Iraq's Parliament poised to pass the agreement.

The countries concluded the agreement concerning a series of negotiated withdrawal dates and criminal jurisdiction without a single statement regarding the alleged detrimental effect of civil litigation in U.S. courts.

Other than the nebulous speculations of Petitioners' attorneys as to what could have happened to negotiations (but did not), Petitioners' brief is a repackaging of arguments already rejected by two esteemed panels of the D.C. Circuit, which found that Congress did not authorize the repeal of jurisdiction as to Iraq in either the 2003 Emergency Wartime Supplemental Appropriations Act or the 2008 National Defense Authorization Act. Further, these holdings are in conflict with no case of this or any other court.

STATEMENT OF THE CASE

1. The *Simon v. Republic of Iraq* plaintiffs are CBS News reporter Bob Simon, cameraman Roberto Alvarez, Mr. Simon's wife Françoise, and Mr. Alvarez's son Robert. Simon and Alvarez were kidnapped by Petitioners on January 21, 1991, while filming the border between Saudi Arabia and Kuwait for a story on the unrest in the Middle East during the Gulf War. Once taken hostage, they were held along with the American POWs in the *Acree* case. Throughout their captivity, they were tortured by Petitioners. They were subjected to prolonged suffering and pain from relentless beatings, sleeping on concrete, cramping, dysentery, starvation, and confinement in near-total darkness. They were used as human shields in a target hit with four 2,000-pound bombs dropped by Coalition forces.

During their imprisonment, they were never permitted to notify their families that they were alive. A Miami newspaper reported that they had been executed, further intensifying the pain endured by their families.

2. The *Seyam v. Republic of Iraq* plaintiffs are the estate of Nabil Seyam and his family. On October 1, 1990, Mr. Seyam, a safety engineer for the Kuwait Metal Pipe Industries Company, who had been hiding from Iraqi forces for two months, was kidnapped and taken hostage by Iraqi soldiers manning a checkpoint in Kuwait. He was used as a human shield in Baghdad and tortured during the lead-up to the war. As an Arab-American, he received especially rough treatment. During his beatings, he was told that if he renounced

his United States citizenship on television, he would be allowed to go free. Seyam refused despite a gun to his head.

3. The *Acree v. Republic of Iraq* plaintiffs are 17 current and former United States military personnel and 37 of their family members.[1] The servicemen were brutally tortured while held as POWs during the 1991 Gulf War. The torture included beatings, electric shock, burns, whipping, starvation, subjection to severe cold and filth, genital inspections to identify Jews, mock executions, and threatened castration and dismemberment. Iraq used the POWs as human shields.

On July 7, 2003, the district court found the Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service liable to the *Acree* plaintiffs for compensatory and punitive damages.

The United States moved to intervene and vacate on July 21, 2003—two weeks after the entry of final judgment. The United States claimed that the district court's jurisdiction had been revoked in May 2003 pursuant to authority allegedly conferred upon the President in § 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 ("EWSAA"). The district court denied the United States' motion. *Acree v. Republic of Iraq*, 276 F. Supp. 2d 95 (D.D.C. 2003).

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1. The *Acree* plaintiffs are not parties to the proceedings below, but in order to explain the background of Petitioners' argument regarding § 1503 of the Emergency Wartime Supplemental Appropriations Act, it is necessary to explain the history of the *Acree* case.

When Congress had earlier enacted § 1503 on April 16, 2003, there was no government in Iraq for the Secretary of State to certify and thus remove from the State Department's State Sponsors of Terrorism List. Therefore, Congress, in order to free up assistance for Iraq without recourse to the official decertification process, passed § 1503 to give the President the authority to remove statutory obstacles to providing funds and goods to Iraq.

Thereafter, on May 2, 2003, the President sent notification of an intent to invoke § 1503. He did the same in his May 7, 2003 Determination.[2] Only later, on May 22, 2003, in a letter to Congress, did the President assert that he intended to invalidate § 1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA").[3]

Following the district court's denial of its motion to intervene in *Acree*, the United States appealed. The court of appeals ruled that § 1503 of EWSAA did not affect the jurisdiction of the courts over cases against Iraq under the FSIA's terrorism exception to immunity. *See Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004).

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2. *See Acree*, 370 F.3d at 57 ("The scope of the May 7 Presidential Determination is immaterial, because it cannot exceed the authority granted in § 1503.").

3. Message to the Congress of the United States (May 22, 2003), http://www.whitehouse.gov/news/releases/2003/05/20030522-16.html (purporting, for the first time, to divest courts of FSIA jurisdiction over cases against Iraq in a Message to Congress).

4. The *Simon* and *Seyam* plaintiffs filed their actions on March 18, 2003 and April 15, 2003, respectively. On January 4, 2005, the Iraqi defendants moved to dismiss the First Amended Complaint in *Simon* and the Second Amended Complaint in *Seyam*. The cases were consolidated with *Vine v. Republic of Iraq* for purposes of the motion to dismiss. On September 7, 2006, the district court dismissed the cases on statute of limitations grounds. Plaintiffs appealed.

5. On December 14, 2007, Congress passed H.R. 1585 (110th Cong. (2007)), titled the National Defense Authorization Act for Fiscal Year 2008 (the "original Act"). In § 1083 of the original Act, Congress amended § 1605 of the FSIA to enhance certain rights of plaintiffs suing foreign terrorist states and clarify the applicable statute of limitations.

On December 19, 2007, following its passage by Congress, the original Act was sent to the President. On December 28, the President, bowing to pressure from Iraq,[4] issued a "Memorandum of Disapproval" announcing that he was exercising a "pocket veto" over the bill.[5] At the same time, the President declared that

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4. "Only after lawyers for the Iraqi government threatened to withdraw $25 billion worth of assets from U.S. capital markets early this week did the White House decide to let the bill die. . . ." Josh Rogin, *At Iraq's Urging, Bush Pocket-Vetoes Defense Authorization Bill*, CQ Today – Defense (Dec. 28, 2007) *at* http://public.cq.com/docs/cqt/news110-000002650500.html.

5. *See* Appendix A at 4a (Memorandum of Disapproval of President George W. Bush (Dec. 28, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/12/20071228-5.html).

in the event the pocket veto was subsequently determined to be ineffective, he intended to exercise a "return veto."[6] The President sent the original Act back to the House with the "Memorandum of Disapproval" (rather than the formal, sealed "Veto Message" that accompanies a return veto) on December 28, 2007.

On January 16, 2008, the House passed H.R. 4986—the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 338 (2008) ("NDAA"), a revised version of the original Act. The revised NDAA retained the earlier version of § 1083 in its entirety, the only difference being that under the NDAA, the President was given the authority to waive, with respect to Iraq, the supplemental rights conferred in § 1083 (*i.e.*, those making it easier to sue terrorist states and to attach property).

On January 23, 2008, Respondents filed a motion at the court of appeals arguing that the President's "hybrid veto" was unconstitutional and consequently the original Act had become law on December 31, 2007.

On January 28, 2008, the President signed the NDAA, and after making the necessary findings as required by Congress as a condition of exercising the waiver, he issued a statement purporting to waive § 1083 as to Iraq.

On February 4, 2008, the court of appeals issued an Order requesting briefing on the issue of the "effect upon the case, if any, of the new Act and of the President's

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6. *See id.*

waiver. In particular, the parties should address whether pending cases filed under former § 1605(a)(7) may proceed on the basis of that provision."

On June 24, 2008, the court of appeals reversed and remanded the *Simon* and *Seyam* cases, ruling that: (1) neither § 1083 nor the President's waiver deprived the courts of jurisdiction over cases which were pending under § 1605(a)(7) when the NDAA went into effect; (2) the cases were timely filed because equitable tolling stopped the running of the statute of limitations; and (3) the "political question doctrine" did not render the cases non-justiciable.

REASONS FOR DENYING THE PETITION

Through a series of legislative enactments, beginning in April 2003 and culminating in January 2008, Congress and the President have so constricted Iraq's potential civil liability that it is now limited to a handful of extant claims, with those few claims exposing Iraq collectively to what is at most a negligible amount of money. Bluntly: no more claims will ever be filed against Iraq for the torturing of U.S. soldiers and citizens and those cases can be settled for nothing of material significance to Iraq. For this reason, the instant action has no bearing on Iraq's reconstruction or the withdrawal of American forces.

Beyond this, there is nothing in the panel's decision which, as a matter of law, is even faintly controversial—nothing which is contrary to the decisions of this or any other court; rather, the opinion below is based on a precise examination of the relevant statute, focusing on

the language of the provision in question and the manner in which that language is informed by the immediately surrounding text. As a matter of statutory interpretation it is conservative and unimpeachable. To overthrow it based on questionable claims about foreign policy would not only offend the honesty and soundness of the panel's effort, but would also violate this Court's longstanding rule that foreign affairs "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Louis Henkin, *Foreign Affairs and the U.S. Constitution* 134 (2d ed. 1996) (quotation omitted).

ARGUMENT

I. *CERTIORARI* SHOULD BE DENIED BECAUSE THIS CASE PRESENTS NO THREAT TO U.S. FOREIGN POLICY INTERESTS.

Petitioners' argument, distended and muddled over ten pages of the Petition, may be distilled down to this: (1) if Iraq is exposed to civil liability, Iraq will retaliate by subjecting American contractors and soldiers to liability in Iraqi courts; (2) that exposure, in turn, will cause a breakdown in the negotiations between Iraq and the United States over the withdrawal of U.S. troops, thereby forcing the United States to remove its troops from Iraq prematurely; and (3) this premature retreat will jeopardize U.S. interests in the Middle East. Pet. 13-22.

This entire construction is a fiction: false in its premises; false in its conclusion. So contrived and farcical is this argument that Petitioners can find not a

single authority, let alone a government official or reputable observer of the negotiations between Iraq and the United States, who actually states any one of these three propositions, let alone all of them chained together. But there is no longer a need for speculation on this subject: the United States and Iraq have just entered an agreement concerning the withdrawal of American forces and criminal jurisdiction over military personnel and contractors; and by no account of the negotiations leading up to the treaty was the panel's decision in this case of any importance.

A. The Decision Below Does Not Threaten The Early Withdrawal Of American Forces.

The reason this case poses no threat to U.S. interests in the negotiations between Iraq and the United States leading up to the recently signed agreement on the withdrawal of U.S. forces, is that beginning in April 2003 and culminating in January 2008, Congress and the President enacted a series of measures which so limited Iraq's potential exposure to civil liability that such liability became a matter of no significance.

Thus, by the time the *Simon* decision was issued in July 2008, neither Iraq nor the United States viewed it as a material impediment, and this is why the careful reader of the Petition will find no quotation from any authority post-*Simon* to the effect that the decision jeopardized the withdrawal of troops.

The following sets forth the chronology of legislation which ended in the capping of all claims against Iraq:

Following Iraq's August 2, 1990 invasion of Kuwait, the U.S. Department of State placed Iraq on the list of terrorist nations.[7] Though sanctions were imposed upon Iraq, it remained immune, as did other sovereign nations, from private suits for terrorist acts. Six years later, the FSIA was amended to permit private suits based on allegations of murder, torture, and kidnapping. That amendment was codified as 28 U.S.C. § 1605(a)(7) (Supp. V 2005).

Immediately prior to the U.S. invasion of Iraq, the President on March 20, 2003 in Executive Order 13,290 confiscated and vested all Iraqi assets frozen in the United States and ordered that the two then-outstanding judgments against Iraq be satisfied.

On October 20, 2004, the United States removed Iraq from the State Department's list of state sponsors of terrorism.[8] Therefore, Iraq could not be liable under § 1605(a)(7) for acts occurring thereafter.

In January 2008, the President, pursuant to the NDAA, permanently banned the filing of all new suits against Iraq. At that point, only six or seven cases were pending against Iraq. This meant that after January 2008, Iraq's potential liability was forever capped at six or seven cases (including *Simon*, *Seyam*, and *Acree*) with likely damages of approximately $1 billion (using Petitioners' generous figure), which, incidentally, is less

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7. *See Determination Iraq*, 55 Fed. Reg. 37,793 (Sept. 13, 1990).

8. *See Rescission of Determination Regarding Iraq*, 69 Fed. Reg. 61,702 (Oct. 20, 2004).

than what Libya paid victims' families in the course of normalization.[9] It was at this point that the civil suits against Iraq ceased to pose a problem for Iraq and, consequently, U.S. foreign policy, and the governments of Iraq and the United States were able to come to an agreement over the withdrawal of U.S. forces without any impediment from *Simon*. Further, Respondents have repeatedly sought to settle their claims with Iraq, including through court-arranged mediation in May 2007, and through Congress. At present, the Justice for Victims of Torture and Terrorism Act (H.R. 5167), which would reasonably resolve the claims for far less than what Iraq claims, is pending before the Senate following House passage in July 2008. Petitioners' arguments

9. Petitioners erroneously claim to know of "no other friendly ally of the United States that has ever been subjected to liability in U.S. courts based on the tortious misdeeds of a formerly hostile regime." Pet. 15. Libya, now friendly and once hostile, was defendant in the cases brought by the Pan Am 103 families. *See, e.g., Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y.), *aff'd in part and dismissed in part*, 162 F.3d 748 (2d Cir. 1998) (affirming subject matter jurisdiction of district court over case against Libyan government defendants for Pan Am 103 bombing; case settled as part of escrow fund agreement). Facing liability in U.S. courts, Libya ultimately settled through an agreement struck by the United States and Britain. *See* U.S. Department of State Fact Sheet (Sept. 2, 2008), http://www.state.gov/r/pa/prs/ps/2008/sept/109054.htm. Libya accepted responsibility for the actions of its officials in the Pan Am 103 bombing and "established an escrow account of over $1 billion to fund an out-of-court settlement with the Pan Am 103 families." *Id.* Following normalization, Libya was still faced with substantial liability for terrorism and so agreed to the Libyan Claims Resolution Act as a means to settle outstanding claims. The Act was signed into law by the President on August 4, 2008.

regarding uncapped or uncertain future liability, or the inability to finalize agreements are, therefore, not well taken.

In any event, contrary to Petitioners' speculation regarding the potential harm this case poses, civil liability has in the past proven not to be, such as in the case of Libya, an impediment to normalization. In fact, adherence to the rule of law is the *sine qua non* of normal relations.

B. The Decision Below Poses No Threat To The Economic Reconstruction Of Iraq.

Petitioners contend that if the decision below is allowed to stand, it will cost the government of Iraq $1 billion. The Court should not be misled: if the legal context, as demonstrated above, changed radically between 2003 and January 2008, so too did Iraq's economic circumstance. This economic transformation has meant that any liability from the cases pending against Iraq could have no significant impact on that country.

The truth is that Iraq is well able to pay those whom it has tortured: Iraq is currently projected to have a budget surplus of nearly $80 billion.[10] Between 2005 and the end of 2008, Iraq will have taken in more than $156

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10. James Glanz & Campbell Robertson, *As Iraq Surplus Rises, Little Goes Into Rebuilding: Oil Windfall Unspent: Report Says Americans Bear Cost – Billions Sit in a U.S. Bank*, N.Y. Times, Aug. 6, 2008, at A1.

billion in oil revenue alone.[11] At the beginning of 2008, Iraq was estimated to have up to $30 billion invested in U.S. banks.[12] Also, while Iraq claims that there will be catastrophic consequences if it has to compensate those whom it has brutalized, that same country has been repaying billions to its sovereign and commercial creditors since at least 2005.[13]

This paradox should also be noted: Iraq has begun to use the United States courts to sue corporations for billions it alleges it is owed as a result of fraud perpetrated on Iraq by 93 corporate defendants through the United Nations' Oil-for-Food Programme,[14] which means that while Iraq is taking advantage of the U.S. courts to redress its own alleged injuries, it is asking this Court to block U.S. servicemen and civilians from using those same courts to seek compensation for mutilations and traumas inflicted upon them by the Iraqi government and its intelligence services.

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11. *Id.*

12. Richard Cowan, *US senator wants Iraq oil funds used for rebuilding*, Reuters (Mar. 4, 2008 5:48pm EST), http://www.reuters.com/article/featuredCrisis/idUSN04467762 (last visited Oct. 7, 2008).

13. *See, e.g.*, Martin A. Weiss, *Iraq's Debt Relief: Procedure and Potential Implications for International Debt Relief*, Congressional Research Service Report for Congress No. RL33378 (Mar. 31, 2008), http://openers.com/ (search "Iraq's Debt Relief").

14. *See Republic of Iraq v. ABB AG, et al.*, No. 1:2008cv05951 (S.D.N.Y. complaint filed June 27, 2008).

And at bottom, Iraq is a solvent, paying debtor and an active litigant.[15] Iraq's claim that it will suffer catastrophic consequences from compensating Plaintiffs is dated and/or unsubstantiated (that is, based upon speculations, including the 2005 law review article of current real estate associate Amy Falls, which precede the President's waiver in January 2008 capping liability) and, given the circumstances of this case (that is, where the Plaintiffs were the subjects of ineffable degradations), is more than slightly repugnant.

Finally, it is necessary to lance Petitioners' suggestion that the Iraqis are wholly hostile to the idea of reparations and especially reparations to citizens of the United States. Pet. 22. What Petitioners left out of their discussion is that the Iraqis, acknowledging the importance of reparations, have, since 1991, made payments to a worldwide class of individuals, corporations, and governments, including the United States, through the United Nations Compensation Commission ("UNCC"). Iraq has paid over $25 billion in compensation for claims made to the UNCC.[16] Currently, funds to pay the reparations are drawn from the United Nations Compensation Fund, which receives

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15. Petitioners argue at 15 that subjecting the current government to liability for past misdeeds is inappropriate. This runs counter to the bedrock principle of international law that the liabilities of a state are not extinguished with the succession of governments. *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 208 (1987).

16. United Nations Compensation Commission, Status of Processing and Payment of Claims (as of 29 July 2008), http://www2.unog.ch/uncc/status.htm (last visited Nov. 20, 2008).

5% of the revenue generated from the export of Iraqi petroleum and petroleum products.[17] While seeking debt forgiveness and compromises with foreign governments such as Kuwait, Iraqis have embraced the principle of paying reparations to individuals who were victims of the former regime.[18] The United States has been instrumental in the reparations process, not only for Kuwaitis, but also for Iraqi victims of the Baathist regime.[19]

In addition to making reparations, the Iraqi government has also demanded reparations. For example, in 2006, the Iraqis demanded compensation for the deaths of 11 civilians in the village of Ishaqi after a U.S. military investigation cleared U.S. soldiers of

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17. *See* United Nations Compensation Commission, Payment Procedure, http://www2.unog.ch/uncc/paymproc.htm (last visited Nov. 20, 2008).

18. "Many Iraqis are keenly interested in the idea of providing reparations to the victims of severe human rights violations. The Coalition Provisional Authority (CPA) and the Iraqi government both took steps to compensate Iraqi victims of Saddam-era crimes. A 'Higher Council for Reparations to Victims of the Former Regime,' eventually began work in late 2004." International Center for Transitional Justice, Middle East and North Africa: Iraq, http://www.ictj.org/en/where/region5/564.html (last visited Nov. 20, 2008).

19. In 2004, the Coalitional Provisional Authority established a Victims' Compensation Fund for Iraqi victims of the former regime. *See* Amb. Bremer Announces Former Regime Victims' Compensation Fund (26 May 2004), http://govinfo.library.unt.edu/cpa-iraq/transcripts/20040526_bremer_compensation.html.

wrongdoing.[20] In 2007, Iraq demanded $136 million for the families of injured victims of military contractor Blackwater.[21] By April 2007, it was estimated that the families of more than 500 Iraqi civilians killed by U.S. soldiers had requested compensation and, at that time, a third of those were compensated.[22]

Petitioners' notion that the decision below will force Iraqis into the arms of Al-Qaeda is so beyond reason, so ludicrous, that in the two pages of the petition in which the argument is set forth (Pet. 22-23) there is not a single authority cited. This is no basis for granting a petition for *certiorari*.

II. *CERTIORARI* SHOULD BE DENIED BECAUSE THE *SIMON* DECISION IN NO WAY CONFLICTS WITH THE PRECEDENT OF THIS OR ANY OTHER COURT.

Petitioners dedicate little time and effort to discussing § 1083, the provision central to the decision on review, and cite no case law with which *Simon* conflicts.

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20. *See* BBC News, *Iraqis reject US Ishaqi findings*, (Jun 3, 2006), *http://news.bbc.co.uk/1/hi/world/middle_east/5044244.stm*.

21. *See* CBS News, *Iraq Demands $136M Blackwater Payout* (Oct. 8, 2007), http://cbs2.com/national/blackwater.iraq.united.2.340902.html.

22. *See* Human Rights Watch, Iraq: US Data on Civilian Casualties Raises Serious Concerns (Apr. 11, 2007), http://www.hrw.org/ (search "casualties raises concerns").

The two cases Petitioners cite assume the law conferring jurisdiction has actually been repealed. But here, the dispute largely centers on whether the law conferring jurisdiction has actually been repealed. It has not been.

Petitioners also fail to note that this Court clarified and limited *Bruner v. United States*, 343 U.S. 112 (1952), in *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006), so as to make it inapplicable to this case. In *Hamdan*, the Supreme Court held that a statute which (a) strips the federal courts of jurisdiction and (b) leaves plaintiffs in pending cases no alternative forum in which to pursue their claims, is solely prospective unless there is express statutory language to the contrary.

In the instant case, where Petitioners have alleged that the waiver provision of § 1083 strips the federal courts of jurisdiction in pending cases, the Plaintiffs have no alternative forum in which to pursue their claims, and there is no express statement in the waiver provision as to the retroactive application of that section.[23] Moreover, in *Bruner*, in direct contrast with

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23. *Hamdan* permits the courts to consider the legislative history of a jurisdiction-stripping statute when determining whether the statute is to be applied retroactively. In the instant case, the statement of Rep. Conyers, Chairman of the House Judiciary Committee, regarding § 1083(d) is directly on point:

> It is important to note that this change does not affect rights under current law. The President's waiver authority extends only to the provisions being newly enacted in this bill; by its clear terms, it

(Cont'd)

the NDAA (and § 1503 of the EWSAA), the statutory provision relating to jurisdiction expressly referred to "jurisdiction" and what cases could not be heard by what court.

The Assessors, on which *Bruner* relied, is also inapposite. In that case, the Court held that inasmuch as the repealing act contained no saving clause, all pending actions fell, as jurisdiction depended entirely upon the act of Congress. *The Assessors v. Osborne*, (9 Wall.) 76 U.S. 567, 575 (1870). That case differs from this case because the Court in *The Assessors* recognized an alternate forum was available. *Id.* at 573-74.

In addition, where, as here, a cause of action would be extinguished, it is beyond contention that Plaintiffs' substantive rights would be impaired. Such a statute that

> retroactively alters the consequences of primary conduct—as by 'impair[ing] rights a party possessed when he acted, increas[ing]

(Cont'd)

> does not extend to current law. There is ongoing litigation . . . under current law; if the President exercises his new waiver authority, that litigation will proceed unaffected by that waiver.
>
> The difference is that, if the President exercises the waiver authority, [current plaintiffs] will not be helped by this new provision we wrote and passed, as we wanted them to be, and as they would be absent the waiver.

154 Cong. Rec. E46, 47 (daily ed. Jan. 17, 2008) (statement of Rep. Conyers).

> a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed,' *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)—is presumptively non-retroactive; such a statute applies to a pending case only if the Congress clearly so provides.

Simon v. Republic of Iraq, 529 F.3d 1187, 1191 (D.C. Cir. 2008) (alteration in original).

Petitioners also point to the fact that Congress provided transitional rules under § 1605A, asserting that because a case could be re-filed within 60 days, or after a judgment, § 1605(a)(7) must have been repealed. Petitioners' argument makes little sense because it does not explain why a plaintiff would choose to continue to litigate a case to judgment even after the 60-day re-filing period, and only later invoke § 1605A's transitional rule. In short, the better explanation, the explanation that best gives meaning to the multiple parts of the statute and the one espoused by the D.C. Circuit, is that plaintiffs were granted a basket of new rights in the NDAA,[24] but the President's waiver means that existing

24. Section 1605A(c) creates a federal statutory cause of action under § 1605A. In addition, § 1083(a) (new § 1605A(g)) permits a lien of lis pendens on any real property (except diplomatic or consular mission property) or tangible personal property in that judicial district. Section 1083(b) (new § 1610(g)(1)) provides that the property of the foreign state and its agencies and instrumentalities is subject to attachment in aid of execution regardless of the level of control of the state over the entity. Section 1083(b) (new § 1610(g)(2)) provides that property regulated by the United States by reason of economic sanctions shall not be immune from attachment.

plaintiffs against Iraq cannot avail themselves of the newly conferred rights. *See also Simon*, 529 F.3d at 1193 ("There would be no reason for the Congress to have tied the 60-day period in § 1083(c)(3) to the date of 'entry of judgment' in a case pending under § 1605(a)(7) when the NDAA became law if, as Iraq argues, the quoted words mean only a dismissal for want of jurisdiction and the Act requires the dismissal of all pending cases."). Because the retroactive application of the revised Act to pending cases would both (1) abrogate the vested rights of plaintiffs and (2) extinguish the jurisdiction of the federal courts, the Court is required to find—by clear and convincing evidence—that Congress intended these results.[25] Petitioners cannot show that this standard is satisfied.

Finally, if by the President's waiver pending cases filed under former § 1605(a)(7) could not "proceed" on the basis of that provision, then such a waiver would breach the separation of powers between the legislative and judicial branches.

The FSIA is a subject matter jurisdiction-conferring statute. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). If the waiver permitted the President to redraw FSIA jurisdiction, then the President unconstitutionally altered the scope of federal court jurisdiction.

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25. *See QUALCOMM, Inc. v. FCC*, 181 F.3d 1370, 1378 (D.C. Cir. 1999) (holding retroactive impact "impair[ing] rights a party possessed when Congress acted[,]" would require the finding of an "express statement" of Congress' intent to abrogate such rights).

In *Rein v. Socialist People's Libyan Arab Jamahiriya*, the Second Circuit reviewed the district court's decision that § 1605(a)(7) did not unconstitutionally delegate legislative power by allowing the existence of subject matter jurisdiction over foreign sovereigns to depend on the Secretary of State's determination of whether particular foreign states are sponsors of terrorism. 162 F.3d 748, 762 (2d Cir. 1998). The court found there was not an unconstitutional delegation of authority at issue in that case because Libya was already on the list of terrorist sponsors when the 1996 amendments to the FSIA were adopted by Congress. *See id.* at 764. The court, though, went on to endorse that a very different situation would "arise if a state on the list when § 1605(a)(7) was enacted was later dropped from the list. In that scenario, a *plaintiff* could put forth a claim of unduly delegated authority." *Id.* (emphasis in original).

Here, the President, by making findings and thereafter exercising the conditional waiver, would be contracting the courts' jurisdiction. That is, the decision *not* to subject Iraq to the jurisdiction of American courts was made by the executive branch and not Congress because the waiver was not self-executing and required affirmative findings and execution by the President. *Accord Rubin v. Islamic Republic of Iran*, No. 03 C 9370, 2008 U.S. Dist. LEXIS 4651, at *47 (N.D. Ill. Jan. 18, 2008) ("Iran's loss of immunity *was not the result of an executive exercise of delegated authority*, and therefore Iran's separation of powers argument fails.") (emphasis added); *see also Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 18 (D.D.C. 2005) (stating the executive

"'can neither grant nor curtail federal court jurisdiction.'") (quoting *Carlyle Towers Condo. Ass'n v. FDIC*, 170 F.3d 301, 310 (2d Cir. 1999)).[26]

III. *CERTIORARI* SHOULD BE DENIED BECAUSE THE *ACREE* COURT'S READING OF § 1503 OF THE EWSAA IS CONSISTENT WITH THE PRECEDENT OF THIS COURT.

In enacting § 1503 of the EWSAA, Congress did not grant the President the authority to make FSIA jurisdiction under § 1605(a)(7) inapplicable to Iraq. Iraq's argument to the contrary relies on the language of a proviso contained in § 1503 authorizing the President to make inapplicable to Iraq "section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism."

The *Acree* court interpreted this proviso consistent with the principal text of § 1503[27] and its context within the EWSAA, as an emergency appropriations provision

26. "More than one circuit court has expressed doubts as to whether Congress can constitutionally delegate such a core power as the power to control the jurisdiction of the federal courts." *Rein*, 162 F.3d at 763 (citing *Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995); *United States v. Mitchell*, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994)). *See* Steven F. Huefner, *The Supreme Court's Avoidance Of the Nondelegation Doctrine In* Clinton v. City of New York: *More Than "A Dime's Worth of Difference,"* 49 Cath. U. L. Rev. 337, 398-99 (2000).

27. The principal language of § 1503, in its entirety, reads: "The President may suspend the application of any provision of the Iraq Sanctions Act of 1990." 117 Stat. at 579.

designed to sweep away 13 years of accumulated economic sanctions provisions in order to allow reconstruction to begin and permit expenditures connected with Iraq. Petitioners would have this Court believe that the court of appeals gave a narrow reading to the scope of § 1503, when in truth, § 1503 was a far-reaching provision—albeit not a boundless one as Petitioners urge—that removed years of legal barriers to funding and assistance to Iraq.

The court of appeals gave exacting scrutiny to the issue, with the majority finding at least four reasons why § 1503's grant of authority to the President included barriers to assistance, but did not include doing away with jurisdiction. *See Acree*, 370 F.3d at 54-55 (highlighting (1) that the language encompasses obstacles to assistance and does not mention jurisdiction; (2) the legislative history; (3) the temporal scope; and (4) the meaning of § 1503 in the context of the other provisions).

A. Nothing Has Transpired To Suggest The *Acree* Court's Reading Of § 1503 Was Inaccurate.

Petitioners claim the President understood that he had removed jurisdiction, but this is contradicted by the President's contemporaneous May 22, 2003 Executive Order, the Executive's silence following the *Acree* decision in 2004, and the 2008 effort to "re-remove" jurisdiction.

The President's May 22, 2003 Executive Order 13,303 immunized *certain* assets from judicial attachment. Had the President believed he had removed

jurisdiction, including over pending cases, he would not have had to specify which Iraqi property was protected "from judicial process" because all assets would have been immunized by virtue of the removal of jurisdiction. Pet. 4-5.

Thereafter, the *Acree* opinion was published on June 4, 2004, with rehearing *en banc* denied on August 19, 2004 and *certiorari* denied on April 25, 2005. It is even clearer now, four years removed from *Acree*, that the court of appeals was not only correct in its statutory interpretation, but that the counterarguments have far less force. This is so because since that decision, *nothing* has changed—*i.e.*, the President never sought and Congress never gave any clarification of the scope of authority; the President never again acted to divest jurisdiction pursuant to § 1503 of the EWSAA, nor did Congress in any way acquiesce.[28]

In addition, the President's memoranda exercising a waiver of § 1083 of the NDAA with respect to Iraq on January 28, 2008 demonstrate the Executive's recognition that the President did not, under § 1503, ouster federal court jurisdiction over § 1605(a)(7) claims. If the President truly believed his actions in 2003 removed federal court jurisdiction with respect to § 1605(a)(7) claims against Iraq, the Executive's concern would be limited to the possibility of reviving § 1605(a)(7) claims as "related actions" under § 1605A; there would be no cause for concern over foreclosure of defenses in

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28. Contrary to Petitioners' argument (Pet. 31 n.12), Congress made clear in § 1083 that § 1503 did not affect jurisdiction. *Simon*, 529 F.3d at 1193 (stating § 1083(c)(4) "ratifies" the holding in *Acree*.)

cases where the courts would have lacked jurisdiction by way of the President's exercise of authority.[29]

B. The Textualist Approach To Statutory Interpretation Is Particularly Suited To The Layered And Dependent Clauses Of The EWSAA.

The court in *Simon*, relying on *Acree*, used the surrounding language and textual structure of EWSAA as a method of ascertaining the meaning of the statutory phrase "any other provision." 529 F.3d at 1193-94. This method of interpreting statutory language has been consistently endorsed by this Court. *See, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (Souter, J.); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 319 (1988) (Scalia, J., concurring) ("Words, like syllables, acquire meaning not in isolation but within their context.").[30]

It was the above approach which the Court in *Acree*—citing *King* and its rationale that no statutory word or phrase, however plain, is intelligible when divorced from its statutory framework—properly

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29. *See* Memorandum of Justification for Waiver of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 with Respect to Iraq (Jan. 28, 2008) at http://www.whitehouse.gov/news/releases/2008/01/20080128-12.html.

30. *See also* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* (Amy Guttmann ed., 1997).

applied to the phrase "any other provision" as it appeared in EWSAA:

> The difficulty with [the government of Iraq's] view is that it focuses exclusively on the meaning of one clause of § 1503, divorced from all that surrounds it. This approach violates 'the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.'

Acree, 370 F.3d at 52 (quoting *King*, 502 U.S. at 221). Having applied the logic of *King* to the statute before it, the court in *Acree* went on to find that its interpretation of the language and structure of EWSAA was supported by the improbability that Congress would have taken an action so radical as to eliminate the jurisdiction of the federal courts without once referencing the abrogation of jurisdiction. *Id.* at 55-56.

This approach was particularly appropriate and suited to the analysis in *Acree*, where the issue concerned a clause in a string of dependant provisos in a broader appropriations provision. Section 1503 appears in the "General Provisions" of the chapter of a supplemental appropriations bill addressed to "Bilateral Economic Assistance Funds Appropriated to the President." 117 Stat. 559, 572, 579.[31] The language on which Iraq relies is not a free-standing provision, but a subordinate proviso.

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31. *See* Appendix B.

A proviso must be construed in light of the principal or enacting clause of the section. "The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation." *United States v. Morrow*, 266 U.S. 531, 534 (1925). "Its grammatical and logical scope is confined to the subject-matter of the principal clause." *Id.* at 534-35. It should not be construed to *enlarge* the principal clause. *See Stearns v. Hertz Corp.*, 326 F.2d 405, 407 (8th Cir. 1964).

The layered and dependent nature of the clause on which Iraq relies requires the style of analysis applied by the court of appeals in order to give it its proper meaning and scope:

> The complete text of § 1503 indicates that the section is concerned with eliminating statutory restrictions on aid and exports needed for Iraq's reconstruction, and not with principles of sovereign immunity or the jurisdiction of U.S. courts. The principal clause of that section provides, "[t]he President may suspend the application of any provision of the Iraq Sanctions Act of 1990." These sixteen words reveal the full intended scope of § 1503; the rest of § 1503 is a series of provisos that explain *how* the President is to suspend that Act.

The Iraq Sanctions Act of 1990 reinforced existing limits on aid and trade involving Iraq. Pub. L. No. 101-513, 104 Stat. 1979 (1990). In particular, it called for full enforcement of § 620A of the Foreign Assistance Act of 1961, 22 U.S.C. § 2371(a) (2000). Section 620A, in turn, bars U.S. foreign assistance to countries designated as supporting terrorism. *See* 22 U.S.C. § 2371(b) (2000).

Once a country has been so designated, though, the process for rescinding that determination is neither quick nor easy. The Secretary of State must provide a report to the House and Senate certifying among other things that the country's government "is not supporting acts of international terrorism" and that it "has provided assurance that it will not support acts of international terrorism in the future . . ." 22 U.S.C. § 2371(c)(1) (2000).

On April 16, 2003, when Congress enacted § 1503, there was no government in Iraq for the Secretary of State to certify. Congress had to free up foreign assistance for Iraq by bypassing the official decertification process and removing § 620A and a host of similar provisions enacted over a decade of increasing hostility to Iraq.[32]

Section 1503 provided a quick fix: it removed section 620A and the most obvious statutory obstacles to providing funds and Western goods.[33]

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32. *See, e.g.*, 22 U.S.C. § 262p-4q (2000) (loans from multilateral lending institutions); 22 U.S.C. § 2349aa-10 (2000) (funds for counterterrorism efforts); 22 U.S.C. § 2377(a) (2000) (development assistance); 22 U.S.C. § 2349aa (2000) (permitting assistance in training, equipment, and "other commodities" to countries not excluded by § 2371).

33. It is contrary to reason that Congress intended to divest courts of FSIA jurisdiction by means of an "any other" clause in a proviso in a supplemental appropriations. Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

In fact, when the Director of the Office of Management and Budget ("OMB"), which prepared the appropriations bill, explained § 1503, he said only that "[t]his provision would repeal the Iraq Sanctions Act of 1990," and that it "would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act."[34]

Moreover, as stated above, the NDAA § 1083(c)(4) stated explicitly that "Nothing in section 1503 of the [EWSAA] has ever authorized, directly or indirectly, . . . the removal of the jurisdiction of any court of the United States." 122 Stat. at 3430.

C. Petitioners' Argument That The EWSAA Impliedly Repealed FSIA Jurisdiction Also Fails.

Petitioners, by necessity, argue that § 1503 removed jurisdiction by implication. Pet. 30-34. This argument also fails because implied repeals of jurisdiction are

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34. Appendix C at 22a (explanation by the Director of OMB to the President, forwarded to Speaker Hastert, of the purpose and effect of the § 1503):

> This provision would repeal the Iraq Sanctions Act of 1990, which requires the President to continue an embargo on Iraq and impose certain mandatory sanctions against Iraq, including prohibitions on arms sales, certain exports, foreign assistance and Export-Import Bank Credits. It would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act.

intensely disfavored, especially when purportedly effected by appropriations provisions. *TVA v. Hill*, 437 U.S. 153, 189 (1978). As a result, the Supreme Court requires an "'irreconcilable conflict'" between the statutes as textual evidence of an implied repeal. *Red Rock v. Henry*, 106 U.S. 596, 601 (1883).

Here, no intent to repeal jurisdiction, let alone a clear one, can be gleaned from the language of the statute which says not a single word about jurisdiction and does not mention the FSIA. And, no irreconcilable conflict is present as evidenced, at the very least, by the court of appeals' ability to facilely and practically harmonize the interplay between the EWSAA and the FSIA.

Second, courts, when assessing repeal by implication, also look to the intent of the drafters and whether the drafters ascribed a specific purpose to the provision. *See Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 544 (6th Cir. 1986) (finding implied amendment was "particularly inapt" where Congress "was focusing upon a particular perceived evil."). Here, OMB, the drafter of § 1503 indicated no intent to alter jurisdiction, but did ascribe to § 1503 a very specific purpose—§ 1503 was limited to removing the Iraq Sanctions Act of 1990, section 620A and 620G, and section 307 of the Foreign Assistance Act. Both factors make repeal by implication implausible.

Third, repeal by implication in an appropriations act is even more disfavored. *See TVA v. Hill*, 437 U.S. at 190 ("doctrine disfavoring repeals by implication . . . applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act.") (emphasis in

original). Going one step further, where, as here, there is no evidence of congressional consideration of the specific issue, no debate, commentary, roll calls or the like, and thus no avowed attempt by Congress to alter policy, or even congressional awareness of the potential substantive impact, the presumption applies with even greater force, requiring, in essence, an open and shut case. *See Hodgson v. Bd. of County Comm'rs*, 614 F.2d 601, 614-15 (8th Cir. 1980). Petitioners cannot make out such a case.

IV. IF THE COURT WERE TO GRANT *CERTIORARI*, IT WOULD HAVE TO ADDRESS THE FACT THAT THE ORIGINAL VERSION OF THE NDAA BECAME LAW BECAUSE THE PRESIDENT DID NOT CONSTITUTIONALLY VETO THE ACT.

If Respondents are correct that the original version of the NDAA came into effect (as they urged to the court of appeals), then it is irrelevant how, if at all, § 1083 affects jurisdiction. The President purported to pocket veto the original Act, and if necessary, return veto the original Act. The President's veto was unconstitutional and consequently the original Act had become law on December 31, 2007.

The crux of the argument is that the pocket veto was ineffective because the Senate was still in session, and that the spontaneous return veto, assuming it actually came into existence, would have been ineffective because it was too late, that is, beyond the 10 days in which the Constitution allows it to be exercised. In any

case, the Constitution does not permit such a dual or "hybrid veto."[35]

The pocket veto was invalid for two independent reasons. First, the Supreme Court has plainly ruled that the recess of one house is not an adjournment of Congress. Second, brief recesses do not make Congress unavailable, and as the D.C. Circuit has held, Congress is not unavailable if arrangements are made for the receipt of presidential vetoes during that time.

The President's invocation of and reliance on his "pocket veto" authority was ineffective because the Congress did not adjourn. The Senate had been in *pro forma* session since December 19, 2007. S. Con. Res. 61, 110th Cong. (Dec. 19, 2007) (enacted). To prevent, among other things, recess appointments, Senate Majority Leader Reid kept the Senate in *pro forma* session into January.[36] The House did not adjourn until January 3, 2008. 154 Cong. Rec. H1 (daily ed. Jan. 3, 2008).

In addition, both the House and Senate by chamber rule have appointed their representative (the Clerk of

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35. It is worth noting that the court of appeals appears to have found merit to Respondents' argument, given its characterization that: "President Bush *sought to* 'pocket veto' the bill", rather than stating that he did veto the bill. *Simon*, 529 F.3d at 1190 (emphasis added).

36. *See, e.g.*, Walter Alarkon, *Democrats say Bush can't pocket veto defense bill*, The Hill.com, (Jan. 2, 2008), http://thehill.com/leading-the-news/democrats-say-bush-cant-pocket-veto-defense-bill-2008-01-02.html.

the House and the Secretary of the Senate) to receive communications from the White House during recess or adjournment. *See, e.g.*, Rules of the House of Representatives, Rule (II)(2)(h) (Sept. 14, 2007).

As such, Congress as a whole did not adjourn, nor was Congress unavailable to consider any veto message from the President, a necessary condition to the use of the "pocket veto."

The only authority relied on by the President in support of his purported veto is *The Pocket Veto Case*. That reliance does not support the validity of his action:

In that case, the Supreme Court made clear that the crucial issue as to whether the President could legally exercise a pocket veto was not whether an adjournment was final or interim, but rather, whether it "'prevent[ed]'" the bill's return because it was "impossible to return the bill to either House." 279 U.S. 655, 680-81 (1929). Unlike the instant case, *The Pocket Veto Case* was decided in the context of a five-month adjournment by Congress. The Court ultimately upheld the pocket veto because the multi-month adjournment prevented the bill's return. To the Court, it was not sufficient for the veto message to be delivered to an officer or agent of the House. *See id.* at 683-84. Nine years later in *Wright v. United States*, 302 U.S. 583, 587 (1938), the Court abandoned its holding that the veto message could not be delivered to an agent of Congress. As a result, *The Pocket Veto Case* lends no real support to the President's position.

Though the President asserted that he would exercise a return veto in the event that the pocket veto was rejected by the courts, any return veto would itself be a constitutional nullity. First, Article I, Section 7 identifies only two vetoes (return and pocket) and not three (return, pocket, and hybrid).[37] The Constitution provides for only two choices in the disjunctive.[38] Second, there is nothing in the debate amongst the Founders over Article I, Section 7 to suggest that the Founders had any intention of permitting a hybrid veto. Nor is there any evidence of a custom of hybrid vetoes at the time the Constitution was drafted (indeed there appears to be no record of hybrid vetoes at all). Third, the very criteria of the pocket and return vetoes preclude – as a matter of logic – the existence of a hybrid veto: Because Article I, Section 7 states that 10 days must pass before a pocket veto can come into effect (time in which the Congress could return from adjournment or the President could sign the bill), any determination by the

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37. There are two types of vetoes under article I, section 7: when Congress has adjourned, the President may veto a bill by taking no action, at which point the bill is automatically defeated with the passage of 10 days (the "pocket" veto); if Congress is not adjourned, the President is required to return the bill to the Congress with a statement of his objections (the "return" veto). *See* U.S. Const., art. I, § 7. While the return veto is subject to a vote to override by Congress, the pocket veto is not.

38. *See* Robert J. Spitzer, *The Law: The "Protective Return" Pocket Veto: Presidential Aggrandizement of Constitutional Power*, 31 Presidential Stud. Q. No. 4 (Dec. 2001) ("Presidential claims of simultaneous pocket veto and regular veto . . . are utterly incompatible with each other, because . . . the regular veto and pocket veto are, by constitutional definition and design, mutually exclusive and different acts. . . .").

courts as to whether a pocket veto is valid must necessarily wait until *after* the ten day period has expired. *A fortiori*, a hybrid veto can never be effective since a return veto must be exercised *before* the ten-day period expires. Simply put, the President cannot constitutionally exercise a pocket veto, wait the ten days needed to determine if it is effective, and then, assuming it is not effective, exercise the return veto; at that point, the time in which to exercise the return veto would have passed.

As a result, the President effected neither a pocket veto nor a return veto.

If both the original and revised Act became law – the former because it was improperly vetoed by the President; the latter because Congress acted upon the false assumption that the veto was valid – Respondents would not be subject to a presidential waiver because the original statute granted the President no such authority. To the anticipated objection that the revised Act superseded the original Act, the response is this: a statute does not supersede a prior statute unless there is evidence of clear legislative intent to do so,[39] and here there is no such intent since Congress, when passing the revised Act, did not assume that the original Act had become law. If Congress had, in fact, known that the original Act had come into effect, Congress would have never enacted the revised § 1083 and its waiver provision.[40]

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39. *See, e.g., United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) ("repeals by implication are not favored, and will not be found unless an intent to repeal is clear and manifest.") (citations and quotations omitted); *supra* section III(C).

40. *See, e.g., supra* note 23.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF DISAPPROVAL DATED DECEMBER 28, 2007

THE WHITE HOUSE
PRESIDENT GEORGE W. BUSH

For Immediate Release
Office of the Press Secretary
December 28, 2007

Memorandum of Disapproval

I am withholding my approval of H.R. 1585, the "National Defense Authorization Act for Fiscal Year 2008," because it would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction efforts and because it would undermine the foreign policy and commercial interests of the United States.

The economic security and successful reconstruction of Iraq have been top priorities of the United States. Section 1083 of H.R. 1585 threatens those key objectives. Immediately upon enactment, section 1083 would risk the freezing of substantial Iraqi assets in the United States – including those of the Development Fund for Iraq (DFI), the Central Bank of Iraq (CBI), and commercial entities in the United States in which Iraq has an interest. Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action

backed by the prospect of punitive damages to support claims that may previously have been foreclosed. This new liability, in turn, will only increase the potential for immediate entanglement of Iraqi assets in the United States. The aggregate financial impact of these provisions on Iraq would be devastating.

While my Administration objected to an earlier version of this provision in previous communications about the bill, its full impact on Iraq and on our relationship with Iraq has become apparent only in recent days. Members of my Administration are working with Members of Congress to fix this flawed provision as soon as possible after the Congress returns.

Section 1083 would establish unprecedented legal burdens on the allocation of Iraq's funds to where they are most needed. Since the fall of Saddam Hussein, I have issued Executive Orders to shield from entanglement in lawsuits the assets of the DFI and the CBI. I have taken these steps both to uphold international legal obligations of the United States and to remove obstacles to the orderly reconstruction of Iraq. Section 1083 potentially would place these crucial protections of Iraq's core assets in immediate peril, by including a provision that might be misconstrued to supersede the protections I have put in place and to permit the judicial attachment of these funds. Iraq must not have its crucial reconstruction funds on judicial hold while lawyers argue and courts decide such legal assertions.

Moreover, section 1083 would permit plaintiffs to obtain liens on certain Iraqi property simply by filing a notice of pending action. Liens under section 1083 would be automatic upon filing a notice of a pending claim in a judicial district where Iraq's property is located, and they would reach property up to the amount of the judgment plaintiffs choose to demand in their complaints. Such pre-judgment liens, entered before claims are tested and cases are heard, are extraordinary and have never previously been available in suits in U.S. courts against foreign sovereigns. If permitted to become law, even for a short time, section 1083's attachment and lien provisions would impose grave – indeed, intolerable – consequences on Iraq.

Section 1083 also includes provisions that would expose Iraq to increased liability in lawsuits. Contrary to international legal norms and for the first time in U.S. history, a foreign sovereign would be liable for punitive damages under section 1083. Section 1083 removes defenses common for defendants in the United States – including res judicata, collateral estoppel, and statutes of limitation – upon which the Iraqi government has relied. And section 1083 would attempt to revive a $959 million judgment against the new democratic Government of Iraq based on the misdeeds of the Saddam Hussein regime.

Exposing Iraq to such significant financial burdens would weaken the close partnership between the United States and Iraq during this critical period in Iraq's history. If Iraq's assets are frozen, even temporarily, that

could reduce confidence in the Iraqi dinar and undermine the success of Iraq's monetary policy. By potentially forcing a close U.S. ally to withdraw significant funds from the U.S. financial system, section 1083 would cast doubt on whether the United States remains a safe place to invest and to hold financial assets. Iraqi entities would be deterred from engaging in commercial partnerships with U.S. businesses for fear of entangling assets in lawsuits. Section 1083 would be viewed with alarm by the international community and would invite reciprocal action against United States assets abroad.

The adjournment of the Congress has prevented my return of H.R. 1585 within the meaning of Article I, section 7, clause 2 of the Constitution. Accordingly, my withholding of approval from the bill precludes its becoming law. The Pocket Veto Case, 279 U.S. 655 (1929). In addition to withholding my signature and thereby invoking my constitutional power to "pocket veto" bills during an adjournment of the Congress, I am also sending H.R. 1585 to the Clerk of the House of Representatives, along with this memorandum setting forth my objections, to avoid unnecessary litigation about the non-enactment of the bill that results from my withholding approval and to leave no doubt that the bill is being vetoed.

This legislation contains important authorities for the Department of Defense, including authority to provide certain additional pay and bonuses to servicemembers. Although I continue to have serious